In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 650

JOHN NICHOLAS, TRUSTEE OF THE ESTATE OF BEACHCOMBER MOTEL, INC., BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In this case a debtor in possession which operated its business during an arrangement proceeding under Chapter XI of the Bankruptcy Act incurred liability for federal taxes which it withheld on wages earned by its employees and for excise taxes. The arrangement proceeding failed, and the debtor was adjudicated a bankrupt before the taxes involved became due. The trustee in bankruptcy neither timely filed tax returns nor paid the taxes. The court of appeals held that (1) the taxes themselves, (2) the interest thereon to the date of payment, and (3) the statutory penalties for failure to file timely returns, all con-

stituted expenses of administration payable as a first priority claim under Section 64a of the Bankruptcy Act (11 U.S.C. 104).

The holding below that the government's claim for interest is an expense of administration entitled to first priority in payment conflicts with *United States* v. *Kalishman*, 346 F. 2d 514 (C.A. 8). The government has filed a petition for certiorari in *Kalishman* (No. 711, this Term, filed November 1, 1965), and review of that question in this case also is appropriate.

On the penalty issue (the second question presented) there is no conflict of decisions (*Kalishman* involves only interest, not penalties). We agree with the court of appeals (Pet. App. 5–6) that this aspect of the case is governed by *Boteler* v. *Ingels*, 308 U.S. 57. See, also, *City of New York* v. *Rassner*, 127 F. 2d 703 (C.A. 2). The two issues are closely related, however. The government's theory is that the trustee's duties include the payment of taxes incurred during the operation of the business under the arrangement proceeding (see Section 378(2) of the Bankruptcy Act (11 U.S.C. 778(2)) and the opinion of the court of appeals, Pet. App. 5); that such duties also embrace the obligation to file timely returns covering such taxes and to pay them when due; and that penalties for failure to file timely returns and interest on the taxes until paid are just as much expenses of administration as the taxes themselves. In these circumstances, we think that, if the Court reviews the interest question, it should also consider the penalty issue—

an issue also likely to arise frequently. See the petition in *Kalishman*, pp. 6–7.

We therefore do not oppose the petition. We believe, however, that because the issues are quite narrow, it would be appropriate for the Court to hear only a single case, and we therefore suggest that the Court should consider deferring action in *Kalishman* until it has decided the present case.

Respectfully submitted.

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